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## CONTEMPT OF COURT AND THE PRESS IN MISSOURI\*

MILTON I. GOLDSTEIN†

### I. INTRODUCTION

On several occasions in the history of Missouri, judges have invoked the contempt power to punish their critics. The state supreme court, acting as a court of first instance, initiated the practice and made its continuance possible by holding unconstitutional a statute which stood in the way.<sup>1</sup> The act specified types of misconduct punishable by contempt and provided that in no other cases could this sanction be used.<sup>2</sup> Out-of-court publications were not on the list. Therefore, when, in 1903, the court cited J. M. Shepherd, publisher of the Warrensburg Standard-Herald, for contempt because of a berating editorial, a choice had to be made: either the courts could not deal summarily with a censuring press, or the legislature lacked the power to limit this jurisdiction. The second alternative was selected; the opinion stated that a court established by state constitution possessed inherent contempt powers of which it could not be divested by a statute.<sup>3</sup>

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1. State *ex inf.* Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79 (1903).

2. "Every court of record shall have power to punish as for a criminal contempt, persons guilty of the following acts, and no other: first, disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority; second, any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings; third, willful disobedience of any process or order, lawfully issued or made by it; fourth, resistance willfully offered by any person to the lawful order or process of the court; fifth, the contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal or proper interrogatory." Mo. Rev. STAT. (1899) §1616. The legislature subsequently removed the words "and no other" (Mo. LAWS 1909, p. 392), leaving the act in other respects as it had been. Mo. REV. STAT. (1939) §2028.

3. 177 Mo. 205, 234-238, 76 S. W. 79 (1903). Enacted in 1835 (Mo. REV. STAT. (1835) p. 160) and modelled upon the contempt statute of New York N. Y. REV. STAT. (1829) part iii, c. iii, tit. 2, art. 1, §10), the Missouri statute was one of a series of restrictive acts adopted in the first part of the nineteenth century following disputed exercises of the contempt power by judges in Pennsylvania (*Respublica v. Oswald*, 1 Dall. 319 (Pa. 1788) and *Respublica v. Passmore*, 3 Yeates 441 (Pa. 1802); Pa. Acts 1808-1809, c. 78, §146), New York (*J. V. N.*

Judicial blessing was thus conferred upon a procedure which, although criminal in purpose, differed in several important respects from the conventional mode of prosecution. A judge who is the target of a critical news story, editorial, or cartoon and is offended thereby may himself set in motion the criminal process<sup>4</sup> by issuing a citation ordering the defendant to show cause why he should not be found guilty of contempt of court or by suggesting to the prosecuting attorney that the latter prepare an information containing the charge.<sup>5</sup> In other cases, the accused, by filing an affidavit of bias and prejudice, can have the matter transferred to another court.<sup>6</sup> But here, although the publication has aroused his ire, the judge may hear the

Yates, 4 Johns. 316 (N. Y. 1809), and by a federal judge in Missouri (see STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (Act of March 2, 1831), c. 98, 4 Stat. 487). Thirty-six states passed laws limiting the scope of the contempt power. Note (1938) 48 YALE L. J. 58.

Although the early cases, decided when the controversies were still remembered, generally sustained the limitations, the later ones avoided their effect by either holding the statutes invalid or by construing the enactments as declaratory rather than restrictive. In only four states—New York, Pennsylvania, South Carolina, and Kentucky—have the statutes withstood attack, while ten others have no reported cases. See Nelles & King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 401, 525.

The federal statute required that the misconduct occur in the presence of the court "or so near thereto as to obstruct the administration of justice," if it were to be punishable by contempt. In *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (1918), the Supreme Court held that this referred to ultimate effect rather than to physical proximity. The history of the statute made this interpretation indefensible (see Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1027-1038; Holmes dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 423), and the original meaning has recently been restored. *Nye v. United States*, 313 U. S. 33 (1941).

4. A contempt may be regarded as criminal where the purpose of the punishment is punitive, to vindicate the authority of the court. *In re Clark*, 208 Mo. 121, 144-145, 106 S. W. 990 (1907); *Carder v. Carder*, 61 S. W. (2d) 388 (Mo. App. 1933); DANGEL, CONTEMPT (1939) 5. "A contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant and is not intended as a deterrent to offenses against the public." *McCrone v. United States*, 307 U. S. 61, 64 (1939); *State ex rel. Chicago, B. & Q. R. R. v. Bland*, 189 Mo. 197, 88 S. W. 28 (1905); *Bender v. Young*, 252 S. W. 691 (Mo. 1923). Classification is sometimes difficult. See *In re Eskay*, 122 F. (2d) 819 (1941).

5. The procedure followed in the contempt by publication cases has not been uniform. In *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 209, 76 S. W. 79 (1903), the attorney general filed an information with the court. In *Ex parte Nelson*, 251 Mo. 63, 157 S. W. 794 (1913), Judge Guthrie issued a citation without an intervening information. In *State ex rel. Pulitzer Publishing Co. v. Coleman*, 152 S. W. (2d) 640 (Mo. 1941), the proceedings originated with an information filed by the circuit attorney in Judge Rowe's court "at the direction and request of the Judge of this court."

6. MO. REV. STAT. (1939) §§1058-1062, 4037.

case himself.<sup>7</sup> Trial by jury does not lie as of right.<sup>8</sup> And there is said to be no judicial review by appeal.<sup>9</sup> Unmitigated by these guarantees, designed to insure a fair and impartial hearing, the contempt power is an anomaly in a democratic system.

"It is and must be a power arbitrary in its nature and summary

7. Although the statute may provide for change of venue in "criminal" and "civil" cases, contempt proceedings are held to be *sui generis* and, therefore, not included. *Dale v. State*, 198 Ind. 110, 150 N. E. 781 (1926); *State ex rel. Short v. Owens*, 125 Okla. 66, 256 P. 704 (1927); *Van Dyke v. Superior Court*, 24 Ariz. 508, 211 P. 576 (1922); *State ex rel. Chicago, B. & O. R. R. v. Bland*, 189 Mo. 197, 207, 88 S. W. 28 (1905); *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 238, 76 S. W. 79 (1903). The particular provisions of a few statutes have been construed as affording trial by a disinterested judge, however. *Bridges v. Superior Court*, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); *State ex rel. Simpson v. Armijo*, 38 N. M. 280, 31 P. (2d) 703 (1934); *Lamonte v. Ward*, 36 Wis. 558 (1875); *State ex rel. Cody v. Superior Court*, 112 Wash. 571, 192 P. 935 (1920). The United States Supreme Court has stated that it was better practice for a judge to disqualify himself (*Cooke v. United States*, 267 U. S. 517, 539 (1925); see also *Re Dingley*, 182 Mich. 44, 148 N. W. 218 (1914) ), and on rare occasions this has been done. *State v. The American-News Co.*, 64 S. D. 385, 266 N. W. 827 (1936). Such a course was termed illegal in the *Shepherd* case. 177 Mo. 205, 238, 76 S. W. 79 (1903).

8. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 238-243, 76 S. W. 79 (1903); *State ex rel. Pulitzer Publishing Co. v. Coleman, Ex parte Fitzpatrick, and Ex parte Coghlan*, 152 S. W. (2d) 640, 645-646 (Mo. 1941). The constitutional guarantee of trial by jury is said to be inapplicable because contempt-of-court cases were not so tried at common law. So far as proceedings to punish constructive contempts are concerned, modern research establishes the contrary. Fox, *CONTEMPT OF COURT* (1927) 49-50; Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010, 1046; Nelles & King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 401; Michaelson v. United States, 266 U. S. 42, 66-67 (1924); Maxey, J., concurring in *Penn Mining Co. v. Miners of Pa.*, 318 Pa. 401, 414-415, 178 Atl. 291 (1935). See also Woodson and Kennish, JJ., concurring in *Ex parte Creasy*, 243 Mo. 679, 712-713, 148 S. W. 914 (1912).

9. *In re Howell & Ewing*, 273 Mo. 96, 200 S. W. 65 (1918); *Ex parte Clark*, 208 Mo. 121, 106 S. W. 990 (1907); *State ex rel. Chicago, B. & O. R. R. v. Bland*, 189 Mo. 197, 88 S. W. 28 (1905); *Carder v. Carder*, 61 S. W. (2d) 388 (Mo. App. 1933); *State ex rel. Hawkins v. Utley*, 124 S. W. (2d) 684 (Mo. App. 1939). The point cannot, however, be regarded as settled. Mo. REV. STAT. (1939) §4130 would seem to permit an appeal in a case of criminal contempt begun by indictment or by information. The *Bland* case, regarded as the fount of authority, involved a civil contempt where the violation of an injunction was brought to the attention of the court by the litigant in whose favor it was issued. In *In re Ellison*, 256 Mo. 378, 165 S. W. 987 (1914), the question not being raised, judicial review was had by appeal. On its facts, the case would not seem to be within the terms of §3740.

Judicial review can be obtained by means of *habeas corpus* if a prison sentence is imposed or by *certiorari* where the punishment consists only of a fine. In *State ex rel. Pulitzer Publishing Co. v. Coleman, Ex parte Fitzpatrick, and Ex parte Coghlan*, 152 S. W. (2d) 640, 641 (Mo. 1941), both routes were taken, *habeas corpus* by the individual defendants and *certiorari* by the corporation. The granting of a petition for *certiorari* is, however, discretionary. See *State ex rel. Jacobs v. Trimble*, 310 Mo. 150, 274 S. W. 1075 (1925); *State ex rel. St. Louis Union Trust Co. v. Neaf*, 346 Mo. 86, 139 S. W. (2d) 958 (1940); *State ex rel. Duraflor Products Co. v. Pearcy*, 325 Mo. 335, 29 S. W. (2d) 83 (1930). "It will be found,

in its execution. It is perhaps nearest akin to despotic power of any power existing under our form of government."<sup>10</sup>

The Missouri law reports disclose only three instances wherein the press has run afoul of the contempt power.<sup>11</sup> Each determination involved the balancing of important social values momentarily in conflict. On one side of the scale lay the interest of society in freedom of the press unrestrained by a censor, albeit a judicial censor, and its abhorrence of all forms of arbitrary action, including summary procedure; on the other, rested the undisputed right of a litigant to a trial free from outside influences and to a decision based on the evidence presented in court. Swift, perhaps even summary, action might on occasion be required to repel interference with this right. Injected into the issue also has been the notion that judicial prestige could and should be maintained by the use of contempt power. That the weights assigned the aforementioned imponderables have not always been uniform is evident from the decisions.

A damage suit, a divorce case, and a prosecution for extortion evoked the critical comment. When a jury brought in a substantial verdict for Rube Oglesby in his suit against the Missouri Pacific Railroad Company to recover for personal injuries, the defendant based its appeal on the insufficiency of the evidence. The supreme court had reversed an earlier judgment for the plaintiff,<sup>12</sup> and it did so a second time.<sup>13</sup> To J. M. Shepherd the decision indicated that "the corruption of the Supreme Court has been thorough." Of that body he wrote:

"It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. . . . The corporations have long owned the Legislature, now they own the Supreme Court, and the citizen who applies to either for justice against the corporation gets nothing."<sup>14</sup>

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also, that where no statutory right of appeal exists or writ of error lies, appellate courts have been astute and diligent in granting relief by inspecting records under writs of *certiorari* or *habeas corpus*." Lamm, J., in *State ex rel. Chicago, B. & Q. R. R.*, 189 Mo. 197, 206-207, 88 S. W. 28 (1905).

10. *State ex rel. Attorney General v. Circuit Court*, 97 Wis. 1, 8, 72 N. W. 193 (1897); see also *State ex rel. Metcalf v. District Court*, 52 Mont. 46, 49, 155 P. 278 (1916); *Cheadle v. State*, 110 Ind. 301, 312-313, 11 N. E. 426 (1887).

11. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79 (1903); *Ex parte Nelson*, 251 Mo. 63, 157 S. W. 794 (1913); *State ex rel. Pulitzer Publishing Co. v. Coleman*, *Ex parte Fitzpatrick*, and *Ex parte Coghlan*, 152 S. W. (2d) 640 (Mo. 1941).

12. *Oglesby v. Missouri Pac. Ry.*, 150 Mo. 137, 37 S. W. 829 (1899).

13. *Oglesby v. Missouri Pac. Ry.*, 177 Mo. 272, 76 S. W. 623 (1903).

14. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 210, 76 S. W. 79 (1903).

That judges, like other men, at times resent criticism, particularly when censure takes the form of vilification, is not surprising. Declaring that "the character and heinousness of the charges have made it absolutely imperative upon this court to take cognizance of them,"<sup>15</sup> the supreme court cited *Shepherd* for contempt and found him guilty of the offense. Here, the court of first instance was at the same time the court of last resort.

Ten years later, Mrs. Clevinger, whose divorce suit was pending in a Kansas City circuit court, sought to dismiss the proceeding. Simultaneously, her attorneys filed a petition for an allowance of counsel fees. Judge Joseph A. Guthrie ruled that the cause would be deemed dismissed on the payment by the defendant of such fees and court costs. William R. Nelson, publisher of the Kansas City Star asserted that, as a result of this decision,

"there can be no reconciliations until lawyers have been paid.

It is an important ruling in favor of the divorce lawyers."<sup>16</sup>

As Judge Guthrie read the article, it charged him with being more concerned about the compensation of divorce lawyers than about marital bliss and with permitting the attorneys whose fees were in question to decide the issue. The offended jurist, concluding that the criticism was unwarranted and that the publication tended to bring him into disrepute, cited his critic for contempt and convicted him of the offense. On review, the decision was reversed. The supreme court agreed with Judge Guthrie that the contempt power could properly be invoked in such a case.<sup>17</sup> The manner in which he sought to exercise it, however, was found defective.<sup>18</sup>

The latest chapter on the subject was written on June 10th, 1941, when the same tribunal handed down a decision in *State ex rel. Pulitzer Publishing Co. v. Coleman, Ex parte Daniel R. Fitzpatrick and Ex parte Ralph Coghlan*.<sup>19</sup> John P. Nick had been prosecuted for extortion before Judge Thomas J. Rowe, Jr. and acquitted on a directed verdict. When on the trial of the co-defendant Edward M. Brady, the same judge suggested that the state dismiss its case unless more evidence would be presented, the circuit attorney accepted the recommendation. To the Pulitzer Publishing Company, its editorial staff, and cartoonist, the result of the *Nick* and *Brady* cases con-

15. *Id.* at 218.

16. *Ex parte Nelson*, 251 Mo. 63, 86-87, 157 S. W., 794 (1913).

17. *Id.* at 96.

18. *Id.* at 99-106.

19. 152 S. W. (2d) 640 (Mo. 1941). Since the proceeding against the corporation involved the same facts as those against the individual defendants and since the cases were tried together and decided by a single opinion, this litigation is hereafter referred to as "The Post-Dispatch Case."

stituted a "burlesque on justice." Promptly, Judge Rowe issued a citation charging that the editorials and cartoon were contemptuous in that (1) the publications scandalized the court and (2) they referred to, and tended to influence the decision of, a pending cause.<sup>20</sup> The defendants were found guilty;<sup>21</sup> but once again the supreme court reversed the judgment of the trial judge, this time on the merits: the first allegation constituted an insufficient basis for invoking the power;<sup>22</sup> the second was found unwarranted by the facts.<sup>23</sup> Regarding the former it should be noted that Judge Rowe had defined the scope of the sanction in terms of the prior rulings in the *Shepherd* and *Nelson* cases.<sup>24</sup> In the seventeen year period which had elapsed since the *Nelson* case, however, the supreme court had changed its mind and curtailed the jurisdiction.

Because the entire subject has been reexamined in the *Post-Dispatch* case, a discussion of the present state of the law appears to be timely. To analyze this latest adjudication in the light of its antecedents and to interpret its significance as a precedent is the purpose of this article.

## II. ANTECEDENTS OF THE POST-DISPATCH CASE

### A. *The Shepherd case*

When judges whose conduct has been assailed in the press invoke summary jurisdiction, the power is rested upon one of two props: it is necessary to protect litigants from trial by newspaper or to maintain judicial prestige. Upon the rationale advanced may depend the result reached in any given case. If the former reason is the correct one, then the fact that a judge has been criticized is relatively unimportant. Interference may come in countless other ways; and, so long as obstruction resulted, the publication would be contemptuous. But, once a final decision has been rendered, it is of no moment to the litigants that future action in another cause may be affected. They have had their day in court unimpeded. If, however, the latter reason is adopted, then the pendency *vel non* of a cause is of no im-

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20. Record in *The Post-Dispatch Case*, 39-40.

21. *Id.* at 85-86. Shortly after rendering judgment, Judge Rowe died. The *certiorari* proceeding, the only one in which Judge Rowe was a party to the record, was revived in the name of his successor, Frank B. Coleman, as Judge of Division No. 12 of the Circuit Court of the City of St. Louis.

22. *State ex rel. Pulitzer Pub. Co. v. Coleman, Ex parte Fitzpatrick, and Ex parte Coghlan*, 152 S. W. (2d) 640, 648-649 (Mo. 1941).

23. *Id.* at 647-648.

24. *Cf.* 177 Mo. 205, 228-230, 76 S. W. 79 (1903) and 251 Mo. 63, 97, 157 S. W. 794 (1913).

portance. If judges as a group, or as individuals, are sensitive to adverse comment, they are no less allergic because the reference is to past action. The test for contempt in the one case is obstruction; in the other, vituperation.<sup>25</sup>

A publication may vilify a judge without being obstructive. The converse is equally true: there may be interference although the court is ignored. Mr. Shepherd's article, however, was objectionable on both counts. The *Oglesby* suit was still pending on motion for rehearing after the judgment for plaintiff had been reversed. At this stage of the proceedings, while the ultimate outcome was still in doubt, the editor of the Standard-Herald made known his views. The plaintiff "had the best damage suit against a corporation ever taken to the Supreme Court."<sup>26</sup> The appeal of the railroad was misconceived, because "no error was allowed to creep into the record at the second trial."<sup>27</sup> Yet this judgment, too, had been reversed. Shepherd's explanation was simple: the judges who concurred in finding for the defendant had "been bought in the interest of the railroad."

"Rube Oglesby and his attorney, Mr. O. L. Houts, have made a strong fight for justice. They have not got it. The quivering limb that Rube left beneath the rotten freight car on Independence hill, and his blood that stained the right of way of the soulless corporation, have been buried beneath the wise legal verbiage of a venal court, and the wheels of the Juggernaut will continue to grind out men's lives, and a crooked court will continue to refuse them and their relatives damages, until the time comes when Missourians, irrespective of politics, rise up in their might and slay at the ballot box the corporation-bought law-makers of the State."<sup>28</sup>

Plainly, these remarks possessed a coercive thrust. Conceivably, the plaintiff was injured, because after the editorial blast a retreat by the court from the position previously taken was rendered more difficult. How the defendant might have been damaged is readily apparent.<sup>29</sup> On the facts

25. Publications "scandalizing the court" are those which charge that the "administration of justice has been corrupt; that the Court has been prejudiced or has acted from improper motives or has played politics in its decision." *State v. The American-News Co.*, 64 S. D. 385, 395-396, 266 N. W. 827 (1936).

26. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 209, 76 S. W. 79 (1903).

27. *Id.* at 210.

28. *Id.* at 210-211.

29. In *Oglesby v. Missouri Pac. Ry.*, 177 Mo. 272, 76 S. W. 623 (1903), the Missouri Supreme Court reversed by a 4-3 vote the judgment for plaintiff in the trial court. The majority found plaintiff's case built upon conjectures, rather than proof, of defendant's negligence. Unless one is prepared to take the position that a motion for rehearing under such circumstances is a formality, the statement that



before it, the court could, therefore, have concluded that the pressure wielded on behalf of a judgment for plaintiff on the motion for rehearing had injured the party litigants, and jurisdiction to punish by contempt predicated upon interference with a pending cause. Such a holding would not, in this instance, have overlooked the scandalizing character of the publication, since it was imputation of improper conduct which created the obstruction. But scurrilous comment in the future might not relate to a pending cause; and, if it did, the tendency to obstruct might not be manifest.

Jurisdiction was upheld on two grounds:

"The contempt in this case . . . is criminal, because it scandalizes the court itself, and, therefore, it is a matter of public concern; and it is civil, because it abuses parties to a cause that is still pending in this court, and because it seeks to prejudice mankind against parties to such pending litigation."<sup>30</sup>

The fact that, on this occasion, the comment referred to, and tended to influence the decision of, a pending cause furnished an additional reason for acting. The court considered the grounds independently sufficient. The argument that a pending case was a necessary ingredient and the citation of cases so holding could have been met by the observation that the *Oglesby* case was pending. Instead, the court, referring to a classification of types of contempt by Lord Chancellor Hardwicke, replied:

"It must be obvious to the discriminating mind that such cases . . . do not cover the whole field, for there is still the first kind of contempt, to-wit, scandalizing the court itself, in which the public is primarily interested, and as to which the injury is just as great whether it referred to a particular pending case or only to the court as an instrumentality of government."<sup>31</sup>

Although the court found support for its action on both grounds, it is clear that scandalizing supplied the stimulus. Aside from the isolated state-

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the case was only "technically" pending when the Shepherd article appeared seems incorrect (see Nelles & King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 525, 546) even though the court did not thereafter reverse its decision.

30. State *ex inf.* Crow v. Shepherd, 177 Mo. 205, 232-233, 76 S. W. 79 (1903). Since the purpose of the proceedings against Shepherd, Nelson, and the Pulitzer Publishing Company and its employees was punitive rather than remedial, the contempts involved were all criminal contempts. See note 4, *supra*. The fact that the charge is obstruction with a pending cause rather than scandalizing does not affect the character of the contempt.

31. *Id.* at 230. Lord Hardwicke's remarks about scandalizing were *dicta*, because the publication involved labelled a party to a pending case. See Roach v. Garvan, 2 Atkyns 469 (1742).

ment that nothing is "of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters,"<sup>32</sup> the opinion contains no detailed analysis of the obstructive character of the publication, how it interfered with the hearing on the *Oglesby* motion, or what degree of interference would justify a contempt proceeding. "The character and heinousness of the charges" made it "absolutely imperative" that the court take action.<sup>33</sup> Without the power to punish by contempt, "the maintenance of law and order would be rendered impossible." Courts of justice "would soon lose their hold upon public respect."<sup>34</sup> A judge would be "a kicking-post for every madman, a butt for every idiot or knave, and withal, an object of contempt of all men."<sup>35</sup>

The legislature had stated that in no instance could out-of-court publications be made the basis of contempt proceedings. The court promptly nullified the restriction. The facts of the *Shepherd* case required only the decision (if the exercise of the power was to be validated) that, where a publication refers to a pending cause and actually obstructs the trial thereof, summary power exists to punish the offense. Only a limited jurisdiction would have been thus conferred, however. Instead, the court, in casting aside the legislative bonds, preferred to stake out a claim to vaster areas of jurisdiction. Publications scandalizing the court as well as articles tending to interfere with the trial of a pending case were punishable by contempt. To be sure, the *Shepherd* publication contained direct accusations of serious judicial misconduct; but since the danger which summary procedure was designed to avert was the loss of public confidence in the judiciary, any remarks critical of a judge might be, and subsequently were, construed as coming within the proscribed area.<sup>36</sup> Undefined were the contours of a pending case and the nature of obstruction therewith which would constitute contempt. The boundaries of contempt jurisdiction, as here defined, possessed a vagueness and flexibility which made them all inclusive. They were calculated to induce caution and to deter editorial criticism.

#### B. *The Nelson case*

Judge Guthrie read in the article published in the *Kansas City Star* the statement that his ruling in *Clevinger v. Clevinger* evinced an unconcern

32. State *ex inf.* *Crow v. Shepherd*, 177 Mo. 205, 232-233, 76 S. W. 79 (1903).

33. *Id.* at 218.

34. *Id.* at 226.

35. *Id.* at 270.

36. See note 38, *infra*.

for marital bliss. He noted, too, the suggestion that he had been guilty of delegating his judicial function by permitting the lawyers concerned to decide the questions. He resented both charges, and, in a citation issued to William R. Nelson, publisher of the newspaper, stated that the article:

"did defame and insult the Circuit Court of Jackson County, Missouri, and did charge its Presiding Judge with subserviency, and that said action in publishing said article tends to bring this court, and the judge thereof, into disrepute, and contempt." . . . <sup>37</sup>

The defendant was found guilty of scandalizing the court.<sup>38</sup> Omitted from the judgment, as from the citation, was a finding or charge of obstruction.

On *habeas corpus*, Nelson was discharged, the result being grounded upon events transpiring at the trial. When the alleged contemner offered to prove that the facts stated in the article were true and did not scandalize the court, objection to the introduction of such evidence was sustained.<sup>39</sup> Judge Guthrie at once proceeded to read an opinion, prepared the night before, finding the defendant guilty.<sup>40</sup> Even though he was prepared to alter this conclusion if anything new should develop, the procedural requirements of the due process clause had not been met. A criminal defendant must be presumed innocent until guilt is established.<sup>41</sup>

37. 251 Mo. 63, 73, 157 S. W. 794 (1913).

38. The all inclusive nature of the definition of scandalizing formulated in the Shepherd case is illustrated by the article of William R. Nelson (pp. 86-87). Unlike the publication of J. M. Shepherd, it contains no express charges of corruption, prejudice, or political bias. See note 25, *supra*. The commissioner, appointed by the supreme court to take evidence, found that the article was substantially true and was not contemptuous in character. Patently, Judge Guthrie's ruling did favor divorce lawyers. Although there is a headline stating "The Lawyer Decided," the body of the publication indicates that what is meant was that the decision was made pursuant to a request and argument by plaintiff's attorney.

39. *Id.* at p. 101.

40. The opinion began as follows:

"It was perfectly clear to me, when I knew this matter was coming on for trial today, although the truth of the matter charged against this court was directly pleaded in the return of this respondent, that no testimony could be offered in the remotest way tending to prove the truth of the article in the respect wherein it is alleged in the complaint that it constituted a contempt of court" (p. 101).

41. *Michaelson v. United States*, 266 U. S. 42 (1924); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911). Where the contempt is direct (misconduct occurring in the presence of the court), punishment may follow immediately, without notice or a hearing. See *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907); *Bender v. Young*, 252 S. W. 691 (Mo. 1923). But where the contempt is indirect or constructive (misconduct outside the presence of the court), the defendant is entitled to notice and an opportunity to defend. *Cooke v. United States*, 267 U. S. 517 (1925); *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907); *Ex parte Nelson*, 251 Mo. 63, 157 S. W. 794 (1913). Courts have occasionally referred to offending newspaper articles as direct contempts. See *Myers v. State*, 46 Ohio 473, 22 N. E. 43 (1889); *People v. Wilson*, 64 Ill. 195, 211 (1872); *Dale v. State*, 198 Ind. 110, 150 N. E. 781 (1926).

The statement that Nelson had not been given a fair trial would have disposed of the case. But the opinion proceeded to deal with other questions. The voluminous discussion in the *Shepherd* opinion had been expressly justified on the ground that the public should have notice of the law, so that well meaning persons might not innocently offend.<sup>42</sup> No reason is assigned for the dictum in *Ex parte Nelson*. Apparently it was intended to demonstrate that the defeat was personal to Judge Guthrie. He had lost a legal battle, but the power of the courts to punish summarily an offending press had not been abandoned. Thus, the scandalizing dogma was reasserted:

"the punishment to be imposed is upon the guilty party for the purpose of punishing him for the crime committed and to deter him and all others from traducing and scandalizing the courts of the country and the judges thereof, which if tolerated, would bring them in disrepute and cause the citizens of the State to lose confidence in and respect therefor, as well as for the majesty of the law itself, all of which would inevitably lead to chaos and anarchy."<sup>43</sup>

The defendant had argued that, to constitute contempt, a publication must refer to a pending cause. Ten years earlier, this contention had been made in the *Shepherd* case and rejected as erroneous: scandalizing the court was in itself a sufficient basis for the exercise of summary jurisdiction.<sup>44</sup> In the *Nelson* case, the same answer could have been made. But, instead of asserting that the pendency of a case was immaterial where the charge was scandalizing, the court took issue on the facts:

"That is a clear misapprehension of the order. While it is true the motion for the allowance of attorney fees had been sustained and the allowance made, yet the order dismissing the case was made upon condition of the payment of the fees so allowed.

Clearly that was not a final disposition of the case. . . .

The allowance in that case not having been paid, it was, according to the authorities cited, still pending and undisposed of at the time the article in question was published."<sup>45</sup>

This line of argument sought to prove that the *Clevinger* case was still pending. But suppose that it was: Where was the interference? Obstruction had been neither alleged nor proved. If the court meant that, given a pending case and an article referring thereto, interference was conclusively presumed, obstruction was a mere fiction. The *Shepherd* case

42. 177 Mo. 205, 215, 76 S. W. 79 (1903).

43. *Ex parte Nelson*, 251 Mo. 63, 97, 157 S. W. 794 (1913).

44. See note 31, *supra*.

45. *Ex parte Nelson*, 251 Mo. 63, 98, 157 S. W. 794 (1913).

furnished no authority for such a conclusion. From the citation, it is clear that Nelson was being punished for scandalizing the court; and, if that is true, of what importance was it that the article referred to a pending case? If the court meant that the offense of scandalizing required a publication directed at a pending case, even though there was no interference therewith, then a new ingredient was being added to the crime.

In rejecting the cases cited by the defendant to show that scandalizing was not a sufficient basis for invoking contempt jurisdiction, the court in the *Shepherd* case had commented on "the error they have fallen into of saying that the contempt must relate to a cause that is still pending." There, the simple answer to the argument was the fact that the contemner's article did refer to a pending case. The court preferred instead to assert a broader power based solely upon the character of the publication. However, in *Ex parte Nelson*, the procedure was reversed. This time the simple answer consisted of the citation of the *Shepherd* case to support the proposition that scandalizing was an independent ground of jurisdiction. Intervening decisions had, however, weakened the authority of the *Shepherd* case,<sup>46</sup> and

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46. In the *Shepherd* case, the court had declared: "The law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts." 177 Mo. 205, 235, 76 S. W. 79 (1903).

In 1905, Judge Lamm, who had not been a member of the court two years earlier, commenced his efforts to limit the *Shepherd* case. In *State ex rel. Chicago, B. & Q. R. R. v. Bland*, 189 Mo. 197, 88 S. W. 28 (1905), he spoke for the court in upholding a statute permitting appeals in cases of civil contempt, although this procedure did not exist at common law. Again, in *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907), in a majority opinion he expressly defined the holding of the *Shepherd* case which alone, as contrasted with the *dicta*, was binding precedent. In a ringing dissent, in which two others concurred, Judge Lamm contended that, as a matter of comity, the court should recognize legislative limitations on the punishment which might be imposed. *Chicago, B. & Q. Ry. v. Gildersleeve*, 219 Mo. 170, 190, 118 S. W. 86 (1909). "I do not hesitate to say that the unregulated, arbitrary, whimsical power to fine or imprison for contempt, a power that will not brook a mere temperate and reasonable control, is contrary to the genius of our institutions and the policy of our Constitution and statutes" (p. 197). The minority opinion in the *Gildersleeve* case later became the law. *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914 (1912). Said the court: "I am aware that this section has been declared unconstitutional in the case of *State ex inf. Crow v. Shepherd*, 177 Mo. 205, and *Railroad v. Gildersleeve*, 219 Mo. 170, but I think those cases are wrong and ought to be overruled. . . . To my mind the sooner some of the broad doctrine of both the *Shepherd* and *Gildersleeve* cases is overruled, the better it will be for the jurisprudence of the State." (p. 708).

It was not long after *Ex parte Nelson* was decided that the court asserted that the legislation regulating contempt jurisdiction had come as a result of "excessive abuse of authority" by judges. "The extreme power claimed by the courts, as announced in the case of *State ex inf. v. Shepherd*, 177 Mo. 205, shows the wisdom of those enactments." *In re Ellison*, 256 Mo. 378, 382-383, 165 S. W. 987 (1914).

the court was beginning to wonder whether its claims to power had not been extravagant. It was thought desirable, therefore, despite the effort required,<sup>46a</sup> to breathe life into Mrs. Clevinger's dormant suit so that the contempt defendant might be confronted with both a pending case and with the scandalizing doctrine.

The opinion in *Ex parte Nelson* exposed the *Shepherd* decision to attack on still another score. The *Shepherd* case had held that judges accused of corruption could personally try their accuser.<sup>47</sup> A single qualification was now imposed: the court must not be biased. The court might state that "the character and heinousness of the charges" made action imperative. It might issue a citation charging that the publication brought the judges into disrepute and public ridicule; but the defendant must not be found guilty until after trial. It is asking too much of human nature to expect a judge to keep an open mind regarding the validity of charges which he, as prosecutor, has formulated.<sup>48</sup> The very construction placed upon the publications by judges in issuing citations, like those to *Shepherd* and *Nelson*, renders it impossible for them to try such cases with objective impartiality.

46a. See pp. 254-255, *infra*.

47. "The judges of this court would have gladly sent this matter to some other court for trial, and by a jury, too, if such a course had any precedent or justification in law. But as such a course would have been illegal and a shirking of their imperative obligations under the law, they had no option but to deny the request, and to execute the law" (p. 238). But see notes 7 and 8, *supra*.

48. See *Cooke v. United States*, 267 U. S. 517, 539 (1925) and *Craig v. Hecht*, 263 U. S. 255 (1923), where Chief Justice Taft stated: "The delicacy there is in a judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest" (p. 279). To the same effect, see *Chicago, B. & Q. R. R. v. Gildersleeve*, 219 Mo. 170, 200-201, 118 S. W. 86 (1909), and *Ex parte Creasy*, 243 Mo. 679, 689, 148 S. W. 914 (1912).

It is because of the recognition of this fact that, although in other cases the findings made in the judgment are immune from collateral attack, in contempt cases no presumption will be indulged in favor of the findings. *In re Howell & Ewing*, 273 Mo. 96, 200 S. W. 65 (1918); *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914 (1912); *Ex parte Shull*, 221 Mo. 623, 121 S. W. 10 (1909). The pleadings are scanned with extreme severity, in favor of the accused. *Sands v. Richardson*, 252 S. W. 990 (Mo. App. 1923); *Ex parte Stone*, 183 S. W. 1058 (Mo. 1916); *In re Shull*, 221 Mo. 623, 121 S. W. 10 (1909) *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914 (1912). The character of the trial afforded has been found ground for reversal. *Ex parte Nelson*, 251 Mo. 63, 157 S. W. 794 (1913); *In re Clark*, 208 Mo. 121, 106 S. W. 990 (1907). Misconduct labelled contempt has been found to be punishable in other proceedings but not by contempt process. *State ex rel. Madden v. Padberg*, 340 Mo. 667, 101 S. W. (2d) 1003 (1937); *In re Ellison*, 256 Mo. 378, 165 S. W. 987 (1914). Of some forty-one contempt cases (many of them for direct contempts) which have come before the appellate courts of Missouri since the *Shepherd* case, slightly more than seventy-five per cent have resulted in the discharge of the convicted contemner.

Before the hearing, Judge Guthrie prepared an opinion finding Nelson guilty. At the trial, offers of proof by the defendant were rejected, and the decision read. But the conclusion of the supreme court that the publisher of the Kansas City Star had been prejudged does not depend upon any of these facts, either singly or in juxtaposition. They might all be altered without necessarily affecting the outcome. If, for example, Judge Guthrie had permitted the defendant to offer proof, the result would have been the same. If the court had adjourned after the hearing and reconvened a month later for the reading of the opinion, the due process clause would still have been violated. Indeed, had the opinion been reduced to writing a week, a month, or a year after the hearing, it would have made no difference provided the judge had arrived at his decision before. The facts of the *Nelson* case merely furnished evidence of a state of mind. Judge Guthrie's error was subjective.

Until science has devised a barometer which will accurately gauge human emotions, conjectures of prejudice can seldom be replaced by more certain knowledge. Rarely can evidence be adduced to show that the trial was a mere formality.<sup>49</sup> To argue, however, that proof of bias would in

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49. In the *Post-Dispatch* case, it was argued that Judge Rowe had prejudged the case (Brief for Relator, pp. 90-110). The contention was based upon the wording of the citation, which contained findings of fact in addition to those presented in the verified information of the circuit attorney and expressed an opinion of guilt, in terms leaving open only the question of the punishment to be assessed; and in the reiteration of the above findings in the judgment, although they were denied in the answer, shown by the publications to be false, and although no evidence was taken.

The supreme court admitted that some of the language used in the citation was "unfortunate"; but found the record "wholly dissimilar to that in the *Nelson* case." The opinion points out that the defendants were given an opportunity (1) to file a return and (2) to present evidence; (3) the court took the case under advisement for several days before rendering an opinion, and (4) exonerated one of the defendants. 152 S. W. (2d) 640, 645 (Mo. 1941). On the first point, it may be suggested that that was true in *Ex parte Nelson* as well; on the second, that the case was decided on the state's motion for judgment on the pleadings. Until it was denied, the evidence stage of the proceedings had not been reached. The third reason lacks probative value. No doubt the fourth reason is the most persuasive. Benjamin H. Reese, one of the original defendants, disclaimed responsibility for the publications and was discharged. This fact is not, however, inconsistent with the hypothesis that the trial judge reserved the right, as in the *Nelson* case, to change his mind from a predetermination of guilt. If knowledge or responsibility for the publication is admitted, a conviction would not necessarily follow. Open mindedness on this issue alone would not, therefore, be sufficient.

The court's conclusion may be supported on the ground that, as a matter of policy, the burden of proof on the issue of prejudgment should be a heavy one and that in this case it was not met. To argue, however, that in the *Nelson* case, the record was "wholly dissimilar" is to distend minor differences in degree into differences in kind.

any event be wanting is to contend that in the *Nelson* case alone was there prejudgment; but that in the others, including the *Shepherd* case, the defendant was presumed to be innocent. A reading of the cases in Missouri and in other jurisdictions casts doubt upon the validity of such a conclusion.<sup>50</sup>

On the surface, the court in *Ex parte Nelson* gave a vote of confidence to the most offensive portions of the *Shepherd* decision. Their eventual repudiation was rendered more certain by the conclusions reached, however. The addition of the pending case ingredient made scandalizing a meaningless hybrid. By enforcing the requirements of procedural due process, the court unwittingly applied the *reductio ad absurdum* technique to the *Shepherd* opinion.

### C. *The scandalizing doctrine*

The judges of the Missouri Supreme Court stated in the *Shepherd* case that the offense of scandalizing the court (as distinguished from interference with a pending case) could be punished summarily. They reasoned that the publisher of such an article should be punished; that judicial prestige would be impaired if judges lacked the power to protect themselves from hostile comment; and that authority could be found to support the jurisdiction. That this conclusion was unsound, however, is not fairly arguable. To justify the exercise of contempt power on the basis of the first reason is to be guilty of a *non sequitur*. History and logic negate the second. Finally, what precedent exists, is inapposite.

A citation for contempt was not the only method of proceeding against *Shepherd*. One who has been libelled can bring a civil suit against his defamer. A criminal prosecution may lie, in addition.<sup>51</sup> If the person injured is a judge, he is endowed with the same remedies. His position neither aggravates nor lessens the character of the offense any more than if he were a member of the legislative or executive branch of the government.<sup>52</sup> If such

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50. See, for example, *United States v. Craig*, 279 Fed. 900 (S. D. N. Y. 1921); *Craig v. Hecht*, 263 U. S. 255 (1923); and *In re Fite*, 11 Ga. App. 665, 76 S. E. 397 (1912), where the judge stated that "in defending the honor of the judge, so inexcusably and unjustly assailed, he could not at all times fully restrain the indignation of the man" (p. 695). See also Nelles & King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 525, 545. The same objection might perhaps be made to this article. The writer was of counsel in the Post-Dispatch case.

51. See MO. REV. STAT. (1939) §§4758-4761.

52. Legislative bodies have power by contempt to compel witnesses to appear before committees and answer questions pertinent to the legislative inquiry. An-



publications injure judges, they are no less harmful to legislators or administrators. Yet, no one seriously contends that the President or Congress, a governor or state legislature is or should be empowered to fend off criticism by contempt process.

Discussion of the conduct of officials is the essence of democratic government.<sup>53</sup> Criticism, as well as praise, aids the electorate in selecting able men for public office.<sup>54</sup> The necessity of removing incompetent or corrupt men may be indicated in this way.<sup>55</sup> Discussion may reveal flaws in judicial doctrine and indicate the need for improvement through corrective legislation. If the comment is just, it is not only the publisher's right, but his duty, to make it. If, on the other hand, the criticism lacks foundation and injury results, the abuses may be penalized; but it does not follow that the contempt process is the weapon to be employed. Where a charge of misconduct has been made against a public officer, truth should be a complete defense.<sup>56</sup> Even if it were an answer to a citation for contempt, few would have the hardihood to attempt to prove to the judge accused that he was venal or corrupt. He is not the proper person to pass upon such an issue. This is a

derson v. Dunn, 6 Wheat. 204 (U. S. 1821); McGrain v. Daugherty, 273 U. S. 135 (1927); *Jurney v. MacCracken*, 294 U. S. 125, 150 (1935). But the power is confined to questions having a valid connection with contemplated legislation (*Kilbourn v. Thompson*, 103 U. S. 168 (1880)) and does not extend to slanderous attacks. *Marshall v. Gordon*, 243 U. S. 521 (1917).

53. "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean v. American Press*, 297 U. S. 233, 250 (1936).

54. *State ex rel. Attorney-General v. Circuit Court*, 97 Wis. 1, 8-10, 72 N. W. 193 (1897); *Storey v. People*, 79 Ill. 45, 51-52 (1875); *Nixon v. State*, 207 Ind. 426, 440, 193 N. E. 591 (1935); *State v. American-News Co.*, 64 S. D. 385, 394, 266 N. W. 827 (1936).

55. The newspaper articles which first charged Judge Manton with bribery and corruption unquestionably scandalized him. See *United States v. Manton*, 107 F. (2d) 834 (1938); *In re Levy*, 30 F. Supp. 317 (S. D. N. Y. 1939).

56. Truth is said to be no defense to a citation for contempt. *Patterson v. Colorado*, 205 U. S. 454, 462 (1907); JOHN L. THOMAS, LAW OF CONSTRUCTIVE CONTEMPT (1904) 86; DANGEL, CONTEMPT (1939) 175. In Missouri, the rule seems otherwise. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 268, 76 S. W. 79 (1903). What happens when the alleged contemner attempts to defend on this ground is illustrated in *Ex parte Nelson*. See note 40, *supra*. Truth would, of course, be immaterial where the charge is interference with a pending cause. *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682 (1905); *Dale v. State*, 198 Ind. 110, 150 N. E. 781 (1926).

situation in which the remedy by libel—where trial is by a jury and a disinterested judge—is better adapted to promote justice.<sup>57</sup>

Most specious of the arguments advanced is that scandalizing publications induce disrespect for the courts and thus impair their usefulness in the trial of future causes. The contempt sanction must therefore be employed to insure the due administration of justice. This contention, if carried to its logical conclusion, would welcome comment as long as it was favorable; summary punishment would be visited upon those who censured. The courts have properly been quick to repudiate any desire for immunity from criticism.<sup>58</sup> "No court can, or should, hope that its opinions and actions can escape discussion and criticism."<sup>59</sup> The experience of the United States Supreme Court, which though frequently scandalized has never made use of the contempt power, and of the several state tribunals, divested by statute of summary power to punish out-of-court publications,<sup>60</sup> has indicated no loss of respect for these courts; nor has it demonstrated any necessity for the power. Instead, it is the attempt to arbitrarily silence criticism that results in a loss of public respect.<sup>61</sup>

Authority to support summary jurisdiction over scandalizing publications has been derived from certain early English cases. This practice, originally founded upon a misconception,<sup>62</sup> has now become obsolete in Great Bri-

57. The Clayton Act and certain state statutes provide for a jury trial in cases where violation of the court's injunction is charged. *Michaelson v. United States*, 266 U. S. 42 (1924); *Penn Mining Co. v. Miners of Pa.*, 318 Pa. 401, 178 Atl. 291 (1935); see also CHAFEE, *FREE SPEECH IN THE U. S.* (1941) 549.

58. See cases cited in note 54, *supra*, and *In re Pryor*, 18 Kan. 72 (1877); *State ex rel. Metcalf v. District Court*, 52 Mont. 46, 155 P. 278 (1916); *Craig v. Hecht*, 263 U. S. 255 (1923).

59. *Dunham v. State*, 6 Iowa 245, 254 (1858).

60. See *Ex parte Steinman*, 95 Pa. 220 (1880); *Rutherford v. Holmes*, 66 N. Y. 368 (1876); *Adams v. Gardner*, 176 Ky. 252, 195 S. W. 412 (1917).

61. "What respect is the public likely to have for a penalty imposed by a judge on a verdict of guilty rendered by himself as a sole juror? In such a case, the people instead of upholding the judge sympathize with the man sentenced. It is a deep-seated human instinct to rebel against arbitrary power." *Penn Mining Co. v. Miners of Pa.*, 318 Pa. 401, 422-423, 178 Atl. 291 (1935). But cf. *State v. Frew*, 24 W. Va., 416, 456 (1884).

In finding Shepherd guilty, the Missouri Supreme Court said: "Let the honest and fair-minded patriotic people of this State say whether or not it was the duty of the court to punish him" (p. 269). The response was immediate. Shepherd's fine was paid by public subscription. At the next election, he was chosen Railroad Commissioner of the State of Missouri. A former judge of the supreme court wrote a book attacking the decision. JOHN L. THOMAS, *LAW OF CONSTRUCTIVE CONTEMPT* (1904).

62. See note 8, *supra*.

tain.<sup>63</sup> It was the spiritual offshoot of a theory of government requiring royalty to be invested with an imaginary perfection. This sanctity devolved upon judges who sat "in his seat concerning his justice and it was meet to keep a 'blaze of glory around them'."<sup>64</sup> But it was not all of the common law which crossed the ocean. Those portions which were inconsistent with American institutions were expressly rejected by statute.<sup>65</sup> Of this nature was the offense of scandalizing the court. "It no more follows that . . . courts possess the power of certain British courts of the eighteenth century to punish summarily for constructive contempts than it follows that the chief executive . . . possesses all the 'inherent powers' of the British eighteenth century chief executive."<sup>66</sup>

Less than a handful of American courts accepted the proposition that scandalizing the court afforded a proper basis for invoking contempt jurisdiction.<sup>67</sup> At the time when Judge Rowe issued his citation to the Pulitzer Publishing Company and to its staff members, however, Missouri was probably one of them.

### III. THE POST-DISPATCH CASE

#### A. *The facts*

The *Post-Dispatch* contempt case had its background in litigation involving the misconduct of John P. Nick and Edward M. Brady, who had been indicted for extorting ten thousand dollars from motion picture exhibitors in 1936. On payment of this sum of money, it was charged, demands for wage increases for the members of the union they represented were withdrawn.<sup>68</sup> After severance, the former was acquitted on a directed verdict;<sup>69</sup> the latter was discharged when the circuit attorney entered a

63. See *McLeod v. St. Aubyn* (1889) App. Cas. 549,561; SULLIVAN, *CONTEMPTS BY PUBLICATION* (1940) 139.

64. *Nelles & King, Contempt by Publication in the U. S.* (1928) 28 COL. L. REV. 401, 408.

65. See cases cited in notes 54 and 58, *supra*; MO. REV. STAT. (1929) §645.

66. *Maxey, J.*, concurring in *Penn Mining Co. v. Miners of Pa.*, 318 Pa. 401, at p. 146, 178 Atl. 291 (1935). The United States Supreme Court has held that Congress does not derive its contempt power from the House of Commons. *Marshall v. Gordon*, 243 U. S. 521, 537 (1917).

67. *Burdett v. Commonwealth*, 103 Va. 838, 48 S. E. 878 (1904); *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071 (1896); *State v. Morrill*, 16 Ark. 384 (1855); *Comment* (1905) 18 HARV. L. REV. 392; *Note* (1923) 36 HARV. L. REV. 93.

68. For a detailed account, see *Robinson v. Nick*, 136 S. W. (2d) 374 (Mo. App. 1940).

69. The case first went to trial before Judge Robert L. Aronson, then sitting in Division No. 12. On October 18, 1939, the jury was discharged because of a conversation held between a juror and a witness. On November 6, 1939, a mis-

*nolle prosequi*. Editorially<sup>70</sup> and by cartoon,<sup>71</sup> the Post-Dispatch criticized the course and disposition of the *Nick* and *Brady* cases, particularly the action of Judge Rowe in suggesting abandonment of the proceeding unless more evidence was forthcoming,<sup>72</sup> the ineffective conduct of the prosecution by the circuit attorney, and the patent defects in Missouri criminal procedure. As a literary device designed to infuse vigor and color into the comment, the legal proceedings were discussed in terms of a theatrical production.<sup>73</sup>

The decree in an equity suit brought by the union against Nick and others provided the occasion for further comment. The court found that the defendants had received from the exhibitors ten thousand dollars (the money Nick and Brady had been charged with extorting) which belonged to the union treasury and ordered them to deposit it there. A second editorial appeared, contrasting the divergent results in the civil and criminal cases and indicating a preference for the former.<sup>74</sup> Awaiting trial on the docket of Judge Rowe at the time was a prosecution against Nick and one Clyde A. Weston, who were charged with extorting sixty-five hundred dollars from motion picture exhibitors in 1937. Judge Rowe directed a citation to the publisher, the editor of the editorial page, and the cartoonist, alleging that the publications charged the court with corruption and partiality in the discharge of its duties and tended to interfere with and obstruct the

trial was declared when it was discovered that one of the jurors had failed to reveal his acquaintanceship with some of the members of Nick's family. On December 11, 1939, Judge Aronson discharged the jurors a third time when one of them reported to the court that he had been offered a bribe to hold out for an acquittal.

70. Record in the *certiorari* proceeding (against the corporation) pp. 16-18.

71. *Id.* at p. 22.

72. Since in the Nick trial Judge Rowe had stated that his decision to take the case from the jury was a close one and since the circuit attorney indicated that some evidence would be presented, the editorial asserted that Judge Rowe should have permitted the case to go to trial.

73. The editorial was entitled "A Burlesque on Justice. THE AMAZING CASE OF PUTTY NOSE, a legal skit in one very short act, presented under the auspices of the State of Missouri, in association with the people of St. Louis, in Circuit Court, Criminal Division, with the following cast. . . ." (Record, p. 16). The cartoon, captioned "Burlesque House in Rat Alley," depicted a theater whose current production was stated to be "10 Grand Gone With The Wind" (Record, p. 22).

74. Brady was discharged on March 4, 1940. The first editorial (note 73, *supra*) appeared on March 5th. Judge Ernest F. Oakley decided the equity suit the same day. On March 6th appeared the second editorial and the cartoon.

75. Ben H. Reese, Managing Editor of the Post-Dispatch, also cited for contempt, disclaimed knowledge and responsibility therefor (Record, pp. 48-49, 67) and was discharged. *Id.* at p. 86.

trial of the *Nick and Weston* case.<sup>75</sup> In due course, the defendants were found guilty.<sup>76</sup>

### B. *The decision*

#### 1. The Scandalizing Doctrine

The scandalizing charge made by Judge Rowe against the Pulitzer Publishing Company and its employees was weaker than that presented in the *Shepherd* case. For forthright expression and literary invective, the article of J. M. Shepherd has no rivals in this state and few serious contenders elsewhere. It was argued by the defendants in the *Post-Dispatch* case that, although their publications criticized Judge Rowe's decision in the *Nick* and *Brady* trials as unfortunate and unsound, the charge of corruption or venality was missing from the articles. Whether or not the difference in the character of the publications in the two cases would have made a difference in the result had the decision on the law been otherwise is not clear. In this instance, the court assumed that the nature of the *Post-Dispatch* editorials and cartoon would not alone have barred a prosecution.<sup>77</sup>

But there was a more formidable obstacle to be hurdled. The period after 1903 (when the *Shepherd* case was decided) had witnessed a broadening of the scope of the due process clause of the Fourteenth Amendment. Freedom of speech was now protected from impairment by state action where it had not been when *Shepherd* was on trial.<sup>78</sup> No federal decision, it is true, had as yet applied the constitutional guarantee to contempt proceedings; but two cases involving the question were then before the United

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76. The defendants' answer denied that the publications scandalized the court or referred to or interfered with the *Nick and Weston* case, set up the public interest in the matter discussed and the publisher's purpose—to improve the administration of justice, and invoked the constitutional guarantees of due process and freedom of speech (Record, pp. 44-63). The case was disposed of on a motion for judgment on the pleadings; the Pulitzer Publishing Company was fined \$2000, execution to issue in default of payment (Record, p. 87), defendant Coghlan was fined \$200 and sentenced to twenty days' imprisonment (*ibid.*), and defendant Fitzpatrick was fined \$100 and ten days' imprisonment (*Id.* at p. 88). The cases of the individual defendants went up on *habeas corpus*, that of the corporation by *certiorari* (Record, p. 89). The three cases were consolidated above.

77. It may be that the concurring opinion did not make this assumption. See note 88, *infra*.

78. It was not until 1925 that the United States Supreme Court held that freedom of speech was protected from impairment by state action by the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U. S. 652 (1925); see dissenting opinion of Brandeis, J., in *Gilbert v. Minnesota*, 254 U. S. 325, 343 (1920), and of Harlan, J., in *Patterson v. Colorado*, 205 U. S. 454, 465 (1907).

States Supreme Court.<sup>79</sup> In both, the state court had sustained the exercise of summary power on the ground that the publications interfered with the trial of a pending case. The jurisdiction was challenged as an abridgment of freedom of speech and of the press. Until the Supreme Court spoke, the nature of the interference required under the Constitution to validate the restriction was in doubt. The temper of the present court, however, gave warning that summary jurisdiction based on scandalizing would not satisfy the minimum requirements.<sup>80</sup> The Missouri Supreme Court avoided the necessity of handling the constitutional problem by repudiating the scandalizing doctrine. Said the court:

"The elaborate argument in the Shepherd case to prove that a publication scandalizing the court was punishable as contempt was based upon a misunderstanding of legal history."<sup>81</sup>

If the cause to which the article referred was concluded, however objectionable the publication might be, it was not punishable as a contempt.<sup>82</sup> That this jurisdiction was founded in error would not alone condemn it. The doctrine was held to be theoretically unsound, as well—the reasons justifying summary procedure did not apply when the case had been closed.

"The reason why a direct interference with a pending case is punishable is obvious. The trial cannot be stopped while another jury is impaneled and the interferers prosecuted criminally or sued civilly. The court must have the power to quickly and in a summary fashion enforce its orders and prevent acts which would hinder and delay the proceedings before it. But in the case of a publication having reference to a closed case, these reasons do not exist."<sup>83</sup>

There being no need for haste, the matter can await a trial by jury.

The Missouri law had been aligned with that of other jurisdictions.<sup>84</sup>

79. *Bridges v. Superior Court*, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939), *cert. granted*, 309 U. S. 649 (1940); *Times-Mirror Co. v. Superior Court*, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940), *cert. granted*, 310 U. S. 623 (1940). Both cases were decided by a single opinion on December 8, 1941. See note 91, *infra*. The last previous contempt judgment of a state court to be reviewed was *Patterson v. Colorado*, 205 U. S. 454 (1907), 18 years before the decision in the *Gitlow* case.

80. This would probably be true under either the clear and present danger rule (*Thornhill v. Alabama*, 310 U. S. 88 (1940)) or the dangerous tendency test (*Gitlow v. New York*, 268 U. S. 652 (1925)). Although the Supreme Court divided 5 to 4 in the *Bridges* and *Times-Mirror* cases, there was no disagreement on this point. Mr. Justice Frankfurter, speaking for the minority, said: "Such foolishness has long since been disavowed in England and has never found lodgment here."

81. See note 22, *supra* at 647.

82. *Id.* at p. 648.

83. *Id.* at p. 647.

84. See notes 54 and 58, *supra*.

Formulated in the *Shepherd* case, where a conviction could have been, and subsequently was, rested upon another ground, the scandalizing doctrine was reaffirmed in the *Nelson* case, where it did no harm, and repudiated in the *Post-Dispatch* case, the first time a conviction depended upon its validity.

## 2. Interference with a Pending Cause

In casting aside a portion of its summary jurisdiction, the court did not reinstate the original legislative restrictions and divest itself of all contempt power with respect to out-of-court publications. The question of interference with a pending cause was raised by the citation and by the judgment of Judge Rowe. However, the finding by the supreme court that the publications did not refer to the *Nick* and *Weston* prosecution<sup>85</sup> made further comment unnecessary. Approval or disapproval of this independent ground of contempt jurisdiction could, therefore, have been withheld for another day. Had this course been followed, though, little would have been left standing in the midst of wreckage: the bulk of the *Shepherd* opinion had been swept away; the dictum in the *Nelson* case was but a confused restatement of the same material. Yet it was the excursion in dicta which now made it necessary that the *Shepherd* case be overruled in part. Nevertheless, the court preferred to indicate that something remained.

"But it is also contended by the relator and petitioners that even though a publication relate to a case still pending in court and constitutes a direct personal and vindictive criticism of the conduct of the court in such case, it cannot constitute contempt. With this we do not agree."<sup>86</sup>

The decision in the *Shepherd* case had been salvaged, the holding approved on the ground of interference with a pending cause.

It is disturbing to find in this opinion the same association of obstruction with criticism of the court before which a case is pending that was present in the *Shepherd* and *Nelson* opinions. The gist of the matter is not criticism but interference. Comment upon the evidence or violent denunciation of a party litigant may produce considerable obstruction.<sup>87</sup> On the other hand, unreasoned criticism of a judge may result in no direct interference at all. In each of the three Missouri contempt cases in which the press has figured, the offense charged was criticism. What had caused trouble was the at-

85. See note 22, *supra* at 649.

86. *Id.* at p. 648.

87. See SULLIVAN, CONTEMPTS BY PUBLICATION (2d ed. 1940) 123.

tempt to convert the offended judge into the aggrieved party when it was the litigants, whose case was the subject of comment, who had been injured. A continuance of this judicial preoccupation could mean that, although the scandalizing doctrine of the *Shepherd* case had been discarded, that of the *Nelson* case was retained.<sup>88</sup>

The atmosphere of the *Post-Dispatch* opinion, however, differs markedly from its predecessors. For the first time the importance of freedom of the press is accorded recognition. In the *Shepherd* case, the argument had been brushed aside with the observation that only abuse was being punished.<sup>89</sup> Such cavalier treatment ignored the deterrent effect of summary jurisdiction and also the truth that a proceeding in which the aggrieved party sits as trier of fact is not calculated to properly decide the issue of use or abuse.

Implicit in the *Post-Dispatch* opinion is a realization of the vital considerations involved.

"The interest of society in the spread of truth is made possible by untrammelled discussion, and this is most important. But there are other social interests such as the preservation of order and the right of litigants to a fair trial and a decision based solely on the

88. See pp. 9-10, *supra*. Judges Douglas and Ellison concurred in a separate opinion which read: "Douglas, Justice concurs, but is of the opinion that 'scandalizing the court itself,' as an institution, is contempt against which a court has the power to protect itself in the interest of the public, a principle heretofore approved by this court in *State ex inf. v. Shepherd*; and for such reason disagrees with so much of the majority opinion which may be construed to deny this power or to overrule *State ex inf. v. Shepherd* as to this principle." 152 S. W. (2d) 640, 649 (Mo. 1941).

The point at which the concurring opinion departs from the majority opinion is not clear. The latter assumed that the *Post-Dispatch* publications scandalized the court. If Judges Douglas and Ellison also indulged this assumption and yet believed scandalizing a proper basis for contempt jurisdiction, a dissenting, rather than a concurring, opinion would have been proper unless, by the phrase "as an institution," a distinction is drawn between scandalizing the judge and scandalizing the court. The argument may be that in certain instances a libel suit would not lie because the offending publication did not single out a judge or group of judges as objects of the attack. A conviction on this ground would violate the Fourteenth Amendment. *Bridges v. California, Times-Mirror Co. v. Superior Court*, 86 L. Ed. 149 (decided Dec. 8, 1941).

89. "It is the liberty of the press that is guaranteed—not the licentiousness. It is the right to speak the truth—not the right to bear false witness against your neighbor." 177 Mo. 205, 257 (1903). That this is not a sound interpretation of the constitutional guarantee, see CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941) 14: "To argue that the federal constitution does not prevent punishment for criminal utterances begs the whole question, for utterances within its protection are not crimes. . . . Clearly, we must look further and find a rational test of what is use and what is abuse. Saying that the line lies between them gets us nowhere. And 'license' is too often 'liberty' to the speaker, and what happens to be anathema to the judge."



law and the evidence, which are equally important; and a balance between these interests in case of conflict must be struck."<sup>90</sup>

An unfettered press free to comment upon the acts of public officials was a potent guarantee that able men would be elected to office and incompetent and corrupt men removed. "Therefore, the judge cannot be immune from criticism. The people who must pass upon his continuance in office have a right to be informed of his weakness, venality, or inefficiency."<sup>90a</sup> But it was just as important that trial by newspaper should not supplant trial by a court and jury.<sup>90b</sup>

These are the only issues properly involved. Yet, in the earlier Missouri cases, freedom of the press had been ignored and the integrity of judicial proceedings considered solely as a makeweight. The *Post-Dispatch* opinion promoted them in the scale of values. Formerly, vindication of judicial prestige was the dominant consideration. Although this mistaken notion was not completely discarded, there was at least a shift in emphasis from the person of the judge to the cause he was engaged in trying. Since the weights of the factors now regarded as controlling were exerted on opposite sides, the necessity of a compromise was apparent. A basis for reconciliation is suggested:

"such information can clearly be given . . . through comment on his actions in closed cases without attempt, through criticism of his conduct in pending cases, to intimidate or interfere with his unbiased decisions."<sup>90c</sup>

If the right to comment on litigation is to be embraced within the definition of freedom of the press, the license to comment upon a closed

90. 152 S. W. (2d) 640, 648 (Mo. 1941).

90a. *Ibid.*

90b. "The freedom of speech provisions of the constitution, for example, do not grant immunity to one who speaks slanderous words of his neighbor, nor prevent the punishment of one who solicits another to commit a crime. In the same way they do not give any privilege to utter or publish words which directly interfere with the orderly processes of a court in administering justice in a pending case. Publication of personal and unreasoned criticism of a court before which a case is pending often tends to substitute trial by newspaper for trial by court and jury, and would tend to bring about a decision based upon the momentary whim of a publisher or the desires of a mob rather than one based upon the law and the evidence." *Ibid.*

But it is equally true that contempt proceedings tend to substitute trial by the person most concerned for trial by jury and by a disinterested judge. See notes 48 and 57, *supra*. The argument is not that offenses should not be punished, but that they should be punished in the usual manner. The examples given in the portion of the opinion just quoted are cases in which the conventional criminal processes were employed.

90c. *Ibid.*

case is a minimum recognition. A greater immunity may, however, be afforded. The court does not state that any reference to a pending case will be punishable as a contempt; nor indeed does it attempt to indicate the nature of the obstruction required to invoke the contempt power. The facts of the *Post-Dispatch* case did not require such a pronouncement. Moreover, the project was fraught with danger since the United States Supreme Court would shortly define the limitations imposed by the Fourteenth Amendment.<sup>91</sup> The court was willing to wager, however, that the Constitution did not abolish summary jurisdiction with respect to out-of-court publications. Its prediction was soon confirmed.<sup>92</sup>

By its opinion in the *Post-Dispatch* case, the Missouri Supreme Court left for the future the demarcation of the outer limits of its contempt power. The holding of the *Shepherd* case was approved, and a veiled warning emitted that criticism of the conduct of judges in pending cases would be viewed with disfavor. But "criticism" is a weasel word, comprehending at one and the same time the intimidating utterance of J. M. Shepherd and the mild expression of disapproval of William R. Nelson. If the court meant to restrict the term to publications of the former type, then freedom of the press will enjoy a sympathetic common law protection in this state. If it did not, the opinion in the *Post-Dispatch* case can be cited to support a future holding narrowly restricting comment to matters which have been finally concluded. Pending clarification, the scope of summary jurisdiction in Missouri is elastic. It can be expanded or contracted at will, subject only to the right of review.

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91. The Supreme Court ruled 5 to 4 that freedom of speech and of the press could be abridged by the contempt power only if there existed a clear and present danger of interference with the trial of a pending case. *Bridges v. California, Times-Mirror Co. v. Superior Court*, 86 L. Ed. 149 (Dec. 8, 1941). Both the majority and the minority opinions apply such a test (pp. 153, 174), although the former indicates that the result would have been the same on the reasonable tendency rule and the latter opines that the difference between the two tests "is not of constitutional dimensions" (p. 170). The majority found the possible influence of the publications in question on the course of justice to be "negligible" (p. 161); to the dissenters, the publications created "an atmospheric pressure incompatible with rational, impartial adjudication" (p. 168).

92. Although Justice Frankfurter expressed fear that the majority opinion deprived the states of power by contempt to prevent interference with the administration of justice (86 L. Ed. 161-162), the majority did not go that far (see p. 161). The analysis in the opinion by Justice Black of the publications involved to appraise their coercive character would not have been necessary if summary jurisdiction were lacking in any event.

## 3. The Historical Fallacy

The assumption that at common law constructive contempts were dealt with summarily has been disproved by the recent studies of Sir John Charles Fox.<sup>93</sup> The truth is that, outside of Star Chamber, they were punished only by the usual criminal procedure, including trial by jury. How the error had its inception and gained currency is "one of the strangest stories in the history of the law."<sup>93a</sup> The discovery by scholars of the mistake has not had immediate judicial repercussions. In the *Post-Dispatch* case, perhaps for the first time,<sup>93b</sup> a court in this country, after reviewing the findings, based a holding thereon: "The elaborate argument in the *Shepherd* case to prove that a publication scandalizing the court was punishable as contempt is based upon a misunderstanding of legal history."

The achievement was a hollow one, however, for the significance of the discovery was not fully appreciated. Elsewhere in the opinion the court discusses the constitutional guarantee of trial by jury and holds it inapplicable to contempt proceedings; elsewhere, too, the court states that judges may invoke summary jurisdiction to prevent interference with the trial of a pending cause. Only in the treatment of the scandalizing doctrine is the historical argument mentioned. But constructive contempts based upon scandalizing publications were not the only constructive contempts which at common law could not be prosecuted summarily. Contempts based upon obstruction had the same erroneous foundation. And the identical "elaborate argument" was employed in the *Shepherd* case to prove them punishable by contempt. If historical fallacy condemns the former, it condemns the latter with equal force. Reasons may, of course, exist for the discarding of the one and the retention of the other. The vice inherent in the opinion in the *Post-Dispatch* case is that in one instance the court accepts this body of information wholeheartedly and in another ignores it completely.

The issue of trial by jury was raised by the defendants in the *Post-Dispatch* case, reliance being placed upon a territorial statute whose requirements, it was argued, were carried over by the guarantee in the state con-

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93. See note 8, *supra*.

93a. FOX, CONTEMPT OF COURT (1927) 227.

93b. But cf. *Michaelson v. United States*, 266 U. S. 42, 66-67 (1929). See also *Pennsylvania Mining Co. v. Miners of Pa.*, 318 Pa. 401, 414-415, 178 Atl. 291 (1935); *Bridges v. Superior Court*, 14 Cal. (2d) 464, 94 P. (2d) 983 (1939); *Times-Mirror Co. v. Superior Court*, 15 Cal. (2d) 99, 98 P. (2d) 1029 (1940).

stitution. As construed by the court, however, this act did not extend trial by jury to contempt proceedings; hence, the constitutional provision could not be invoked.<sup>94</sup> But, as already noted, Sir John Charles Fox found that constructive contempts were tried by a jury at common law, and the Missouri Supreme Court endorsed his conclusions. The constitutional guarantee would thus apply irrespective of the territorial statute. Moreover, it would follow that, since at common law constructive contempts were not tried summarily, the legislative restrictions—invalidated in the *Shepherd* case—defined contempt jurisdiction as it existed at common law.<sup>95</sup> The inherent contempt powers possessed by courts were not, therefore, limited in any way, and the statute could not have been unconstitutional. Although it is true that the contempt statute was amended to remove the bar against the exercise of summary power in instances not specified in the act, the result would be the same. The restriction of this jurisdiction to the enumerated instances would stem from the common law.

The historical argument was probably merely one of several considerations impelling the repudiation of the scandalizing doctrine. A rule of law, though born in error, may be presently useful. Subsequent discovery of its origin would not justify its extirpation. Piece-meal acceptance of the material of Sir John Charles Fox might be a valid conclusion. But if this were intended, the court should have so stated. Judicial silence will be construed as evidence that the matter was not considered and that the question remains unsettled. At some future date when contempt power is invoked to punish for interference with a pending case, the jurisdiction will be attacked upon historical grounds. And the issue of trial by jury will again be raised and supported by quotations from the opinion in the *Post-Dispatch* case.

#### 4. The Pending Case Concept

##### a. *When is a case concluded?*

Once the court decided that judicial prestige was not the interest protected by summary jurisdiction, an objective appraisal of the considerations

94. 152 S. W. (2d) 640, 645-646 (Mo. 1941).

95. Fox, CONTEMPT OF COURT (1927) 226: "The result may be that where, in the United States, there is a conflict between the Judiciary and the Legislature, the Legislature and not the Judiciary has correctly interpreted the law, and the decisions asserting the power of the Court to punish certain classes of contempt by summary procedure will need reconsideration. The Courts will have discarded the statutes and founded themselves on English decisions, whereas the law turns out to be, not what the the decisions indicate, but what the American statutes have declared it to be."

involved became possible. So far as the public is concerned, the proceedings of courts are ephemeral, of interest only in the present. If press comment is to be effective, therefore, it must follow closely upon the act appraised. Newspapers deal in news, not history. A rule of law deferring comment impairs the value of the publication by affecting its timeliness. As the period of enforced delay is increased, the restriction grows more burdensome.<sup>95a</sup>

How long is a case to be regarded as pending? Until judgment is rendered? Until the case is removed from the docket? What test can be applied?

A decision rendered by the court in an earlier case made this question acute. In *State v. Lonon*,<sup>96</sup> it was held that a judge could, at any time during the term, set aside a *nolle prosequi* and reinstate the cause upon the docket. Since the extortion proceedings against Edward M. Brady had been *nolle prossed* and the term had not yet expired, Judge Rowe might have reconsidered the matter. Therefore, it was argued, the *Brady* case was pending during the entire term; hence the Post-Dispatch publications referred to a pending cause.

In *Ex parte Nelson* the situation was somewhat similar. The *Clevinger* divorce suit had been dismissed subject to the payment of attorneys fees and court costs. Judge Guthrie had not been asked to review his ruling, the subject of Mr. Nelson's criticism. All that remained was a mechanical act on the part of the defendant, in no way related to the merits of the case. Yet the supreme court stated that it was a mistake to suppose that the

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95a. Justice Black makes this argument very effectively in the majority opinion in the *Bridges and Times-Mirror Co.* cases. 86 L. Ed. 149, 156: "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height.

"Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted.

"This unfocused threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks."

96. 331 Mo. 591, 56 S. W. (2d) 378 (1932).

divorce suit was not pending at the time the article was written.<sup>97</sup> The effect of this dictum would be to make a case pending even after final judgment had been rendered. In the *Post-Dispatch* case, however, the court refused to follow through. Of *State v. Lonon* the court said:

"But this holding does not necessarily mean that after a case has been dismissed it is still to be considered pending during the entire term at which the order of dismissal was made within the meaning of the contempt rule above set out. There are intimations to that effect in *Ex parte Nelson*, 251, Mo. 63, 157 S.W. 794, but we are convinced that that is not the law. [citing cases] To rule otherwise would be to narrow the limits of permissible criticism so greatly that the right to criticize would cease to have practical value."<sup>98</sup>

Whether, by the statement that the "intimations" in *Ex parte Nelson* were not the law, the court intended to repudiate the dictum or merely to reject the implications therein contained as they applied to the facts of the *Post-Dispatch* case is not clear. The facts of the *Nelson* case can be distinguished from those of *State v. Brady*. In the latter, the cause had been concluded, although by appropriate action it might be reinstated. In the former, the cause remained on the docket of the court despite the fact that it lay in the power of the defendant to remove it. But, as a practical matter, there is no difference. The rulings in both instances had been made before the publications appeared. Nothing awaited decision at the time. The restraint upon the press was as great in the one case as in the other. If the doctrine of *State v. Lonon* were incorporated into the definition of a pending case, newspaper comment would be delayed one term; application of the dictum in *Ex parte Nelson* could cause a greater delay. Disavowal of the dictum in the *Nelson* case would seem, therefore, to be implicit in the rejection of *State v. Lonon*.

The problem of how long a case is pending can be presented in a great many factual combinations. Only a few of these situations have, as yet, been ruled upon in Missouri. Few will deny that a cause is pending when argued on a motion for rehearing, as in the *Shepherd* case. Where the prosecution has been dropped, as in the *State v. Brady* case, it seems reasonable to hold that the stage of finality has been reached. These are not mechanical questions to be judged by the technical criterion of whether the case still possesses

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97. See p. 239, *supra*.

98. See note 22, *supra* at 649.

life or could conceivably be revived.<sup>99</sup> If comment is to be restrained because of interference, the curb should apply only where a real danger of obstruction with a matter then awaiting determination exists. The ruling in the *Post-Dispatch* case gives promise that this problem will be handled in a realistic manner.

b. *Which case must be pending?*

Judge Rowe charged in the citation and found in judgment that the editorials and cartoon in the *Post-Dispatch* tended to interfere with the trial of the case of *State v. Nick and Weston*. At the time of the Brady discharge and the *Post-Dispatch* comment, this cause was on Judge Rowe's docket awaiting trial.

The supreme court found that the publications referred to the *Nick* and *Brady* trials and not to the *Nick and Weston* case.<sup>100</sup> Weston's name was mentioned once in an editorial; but that was in connection with the equity suit.<sup>100a</sup> Even so, there was a great deal of similarity between the two cases. True, the *Nick and Weston* case involved an independent transaction which took place in 1937 instead of 1936; one of the defendants was new as were certain of the exhibitors. Yet, the points of likeness are more impressive: both had their setting in the dealings of the same union and the same exhibitors. Why then should interference with the *Nick and Weston* case not be regarded as a proper basis for contempt? The Missouri Supreme Court gave this answer:

"True, Nick was a party to both criminal cases and the issues involved were similar. But, if right to criticize a closed case is to be denied simply because a case involving a similar issue is still pending, it would be so greatly curtailed as to be valueless. Nor can the simple fact that the same party appears in both cases be determinative. Sometimes a large number of cases are filed against one defendant. Could it be contended that a writer must wait until the last of these cases was decided before uttering any criticism of the decision of the first? A careful reading of the editorials and a careful consideration of the cartoon leads us to the view that they did not interfere with or influence the case of *State v. Nick and Weston*, but were leveled exclusively at the concluded *Nick-Brady*

99. See dissenting opinion of Holmes, J., in *Craig v. Hecht*, 263 U. S. 255, 281 (1923); Comment (1941) 26 WASH. U. L. Q. 564.

100. See note 22, *supra* at 648-649.

100a. See p. 247, *supra*.

cases and not at the pending criminal charges against Nick and Weston."<sup>101</sup>

Two reasons are assigned: First, publication of the Post-Dispatch editorials and cartoon did not influence the *Nick and Weston* case; second, to hold otherwise would impose too great a restraint.

If the court meant that the outcome of the *Nick and Weston* case was not affected by the publications, the conclusion might be a reasonable one, although it would occasion dissent. If, on the other hand, the court intended to assert that comment on closed cases may not influence other pending actions, the conclusion is patently incorrect. Forthright comment, even after the final adjudication of a case, may influence judges in deciding future similar cases. Editorials denouncing the granting of excessive allowances in receiverships or the issuance of injunctions in support of "yellow dog" contracts played an important role in curing the abuses against which they inveighed. "If a decision of a judge is bitterly criticized after he has rendered it, it is hardly to be expected that he can entirely erase that fact from his mind when a few months later he comes to try a very similar case."<sup>102</sup> This is as true of praise as of criticism.

The court did not err in result; but the reason for denying contempt jurisdiction rests solely on considerations of policy. It is another instance in which "a balance between these interests in case of conflict must be struck." If similarity in parties—plaintiff or defendant—made it necessary that comment be postponed, the delay would be indefinite. The single-term postponement entailed by the application of *State v. Lonon*, would be slight by comparison. If similarity of issues necessitated restraint, comment might be forever delayed.

Such a rule would have the added vice of impeding discussion in cases where comment would be proper. An examination of all the court files in the jurisdiction would be necessary to discover other litigation involving similar parties or issues. For a publication with nation-wide coverage, the search required would need be even more extensive. Then too, a party might be involved in a suit, although his name did not appear of record.<sup>103</sup>

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101. *Ibid.* A federal prosecution against Nick and Weston, which included among the charges the extortion of the sixty-five hundred dollars from exhibitors in 1937, resulted in the conviction of the defendants. See *Nick v. United States*, 122 F. (2d) 660 (1941), *cert. denied*, (1941) 10 U. S. L. WEEK 3176.

102. *State v. American-News Co.*, 64 S. D. 385, 397, 266 N. W. 827 (1936).

103. Since the case against Nick and Weston was on Judge Rowe's docket, an extensive search would not have been required to discover it. Yet, the principle discussed is applicable since litigation involving Nick and Weston in federal and



Broadly speaking, all experience tends to bolster or weaken given conclusions. To avert outside influence which might affect future judgments would require an order freezing the mental processes of judges as of a given date or isolating them from contact with their fellows.

In the *Post-Dispatch* case, the court adopted a happy compromise. The danger of interference should be minimized. Therefore, publications must be explicit in referring to a concluded case; the identity of the parties involved and the action taken must be distinctly set forth. These precautions taken, the publisher's immunity is complete.<sup>104</sup>

#### IV. CONCLUSION

With the opinion in the *Post-Dispatch* case an era of contempt law in Missouri came to a close. It was a period characterized by widely fluctuating doctrine. For three quarters of a century out-of-court publications were by statute removed from the orbit of summary jurisdiction.<sup>105</sup> In 1903, as a result of the unfortunate opinion in the *Shepherd* case, the pendulum swung to the other extreme: the restrictions were invalidated and power asserted to deal not only with publications interfering with the trial of a pending case but also over those which scandalized the court. The view that the contempt sanction was a device to ensure judicial prestige was unsound in principle; it was unwise as a matter of policy. Removed from the emotional strain of the *Shepherd* case, the court began to doubt the wisdom of its extravagant claims to power. In *Ex parte Nelson*, the court tried to hedge, imply that scandalizing publications could be punished summarily only when they referred to a pending case. The way was paved for the general retreat of the *Post-Dispatch* case, where the court, abandoning scandalizing as an independent basis for summary power, sought a middle course.

Briefly stated, the Missouri Supreme Court held in judgment that comment, however critical, was not punishable by contempt if it referred

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state courts growing out of the same activities had not been concluded at the time this article was being written, long after the lessons learned in *State v. Nick and Brady* had grown stale.

104. "The danger that the administration of justice in future cases will be embarrassed or impeded by criticism of past decisions (even if violent, vituperative, or undeserved) is relatively remote and we think it better, as a matter of social policy that such risk should be taken rather than that the process of contempt should be used in such cases." *State v. American-News Co.*, 64 S. D. 385, 397, 266 N. W. 827 (1936).

105. See note 3, *supra*.

to litigation already concluded. The finality of the determination was neither affected by the fact that, until the term of court expired, the cause might be reinstated on the docket nor by the circumstance that another cause, involving similar issues and parties, was then awaiting trial. Dictum being a conventional ingredient of a contempt opinion, the court warned that publications interfering with the trial of a pending case could still be punished summarily.

The opinion in the *Post-Dispatch* case is important primarily for the work of destruction accomplished. The scandalizing doctrine was eradicated from the law and a closed case so defined as to provide freer rein to press comment. To say that the court took a step in the right direction should not, however, obscure the fact that much still remains to be said. Several major problems, such as trial by jury and the scope of summary jurisdiction, cannot be regarded as settled because of the court's failure to consider the effect of the *Fox* historical data. Although the opinion declared that publications interfering with the trial of a pending case were punishable summarily, the nature of the obstruction required was left for future determination. The danger that temperate comment may be converted into fancied obstruction because of a judicial preoccupation with criticism has not been removed by the *Post-Dispatch* case.<sup>106</sup> By its opinion in the *Bridges* and *Times-Mirror Co.* cases, the United States Supreme Court has indicated that it will be on the alert to prevent abuse of the contempt power by state courts. Abridgment of the guarantee of freedom of speech was found where publications, stronger than the editorials and cartoon of the *Post-Dispatch* and referring to a pending case, were made the basis for summary punishment. Within the framework of the opinion in the *Post-Dispatch* case, the Missouri Supreme Court may extend equivalent common law protection to the press.

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106. The judges referred to by the publications in the *Bridges* and *Times-Mirror* cases did not themselves try the contempt charges against these defendants. 86 L. Ed. 149, 175. See note 7, *supra*.